

This Opinion is Not a
Precedent of the TTAB

Mailed: November 2, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Pump Haircare Pty Ltd

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Serial No. 79311831

Rosaleen H. Chou and Alexander G. Trimes of Knobbe Martens Olson & Bear LLP,
for Pump Haircare Pty Ltd.

Marcy Betts, Trademark Examining Attorney, Law Office 106,
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Before Kuhlke, Thurmon and Johnson,
Administrative Trademark Judges.

Opinion by Thurmon, Administrative Trademark Judge:

Pump Haircare Pty Ltd (“Applicant”) filed a Request for Extension of Protection, pursuant to Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a), of an international registration for the standard character mark PUMP HAIRCARE on the Principal Register for a large number of hair care goods (listed below)¹ in

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¹ Application Serial No. 79311831, filed April 6, 2021, based on International Registration No. 1593406, with a priority claim date of March 25, 2021 pursuant to Section 67 of the Trademark Act, 15 U.S.C. § 1141(g). The word “HAIRCARE” is disclaimed.

The application identifies the following goods in International Class 3:

International Class 3 and a number of retail services (listed below)² in International Class 35.

Non-medicated hair care products, namely, shampoos, hair conditioners, hair masks, hair sprays, hair styling foams, hair oils, and non-medicated hair growth serums; non-medicated hair care preparations; preparations for cleaning the hair, namely, shampoos; hair lotions; hair colours; non-medicated hair grooming preparations in the nature of shampoos for animals; hair conditioners; hair shampoos, namely, herbal hair shampoo; non-medicated anti-dandruff shampoo, namely, herbal anti-dandruff hair shampoo; hairstyling and finishing products, namely, hair sprays, hair foams, and hair gels; preparations for fixing the hair, namely, hair sprays, hair styling foams, and hair gels; preparations for protection of the hair from the sun, namely, hair sprays; preparations for the permanent waving of hair, namely, hair sprays; setting preparations and lotions for the hair, namely, hair sprays, hair styling foams, and hair gels; dyes for the hair; tints for the hair; topical preparations for promoting hair growth, namely, non-medicated hair growth serums; non-medicated wax treatments for the hair for cosmetic purposes; waving preparations for the hair; mousses for use in styling the hair; styling gels, lotions and sprays for the hair; beauty care products, namely, shampoos, hair conditioners, hair masks, hair sprays, hair styling foams, hair oils, hair gels, non-medicated hair growth serums, non-medicated eyelash growth serum, skin moisturizers, skin cleansers, and body scrubs; non-medicated skin care preparations and products, namely, skin moisturizers, skin cleansers, and body scrubs; non-medicated soaps; cosmetics, namely, hair cosmetics; perfumery; essential oils; bleaching preparations for hair; anti-static preparations for household purposes; lacquer removing preparations for nail care; massage gels other than for medical purposes; oils of turpentine for degreasing; eyelash care products, namely, non-medicated eyelash growth serum; oils for the hair; preparations for enriching the hair, namely, shampoos, hair conditioners, hair masks, hairsprays, hair styling foams, hair oils, and non-medicated hair growth serums; all of the foregoing excluding powders.

² The application identifies the following services in International Class 35:

Retail services through direct solicitation by salespersons directed to end-users featuring non-medicated hair care products and preparations; retail store services featuring non-medicated hair care products and preparations; wholesale store services featuring non-medicated hair care products and

Registration was partially refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the standard character mark PUMP POWDER registered on the Principal Register for “hair care preparations; hair styling preparations” in International Class 3, that it is likely to cause confusion or mistake or to deceive.³ The Examining Attorney’s partial refusal applies to all goods in International Class 3 and all services in International Class 35 with the exception of “consultancy, advisory and information services relating to retail and wholesale service and sales promotions.”⁴

Applicant appealed and filed a request for reconsideration which was denied. The appeal is now fully briefed. We affirm the partial refusal to register.

I. Evidentiary Ruling

Before we turn to the merits, we rule on an objection the Examining Attorney made to evidence Applicant submitted with its brief. Applicant submitted ten exhibits with its appeal brief, most of which reproduce records Applicant submitted during

preparations; wholesale services through direct solicitation by salespersons directed to end-users featuring non-medicated hair care products and preparations; sales promotion for others; provision of an online marketplace for buyers and sellers of goods and services; consultancy, advisory and information services relating to retail and wholesale service and sales promotions.

³ Registration No. 6524259, registered October 19, 2021, on the Principal Register. The word “POWDER” is disclaimed.

⁴ Final Office Action, dated August 4, 2022. Citations to the prosecution file refer to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system in .pdf format. Citations to briefs refer to the actual page number, if available, as well as TTABVUE, the Board’s online docketing system. The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry. See *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

examination.⁵ Those materials are in the record, and did not require resubmission. But Applicant also submitted additional registrations and Internet evidence with its appeal brief that were not submitted during examination. This new evidence is found in Exhibits B and C to the appeal brief, and will not be considered in this appeal,⁶ because the record in an application should be complete prior to the filing of an appeal. Trademark Rule 2.142(d), 37 C.F.R. §2.142(d); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE §§1203.02(e), 1207.01; Trademark Manual of Examining Procedure §710.01(c).

II. Likelihood of Confusion – Applicable Law

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”), *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence or argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). “Whether a likelihood of confusion exists between an applicant’s mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). When

⁵ 6 TTABVue 28-181 (Exhibits A through J).

⁶ *Id.* at 43-112.

analyzing these factors, the overriding concerns are not only to prevent buyer confusion as to the source of the goods, but also to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *Shell Oil Co.*, 26 USPQ2d at 1688 (“the various evidentiary factors may play more or less weighty roles in any particular determination”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *see also In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). These factors, and others, are discussed below.

III. Likelihood of Confusion - Analysis

A. Similarity of the Marks

To evaluate the similarity of the marks, we consider the marks in their entireties as to appearance, sound, connotation and commercial impression. *See, e.g., Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (citing *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d, 1810, 1812 (TTAB 2014)), *aff’d per curiam*, 777 F. App’x 516 (Fed. Cir. 2019). *Accord, Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

“The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). The focus is on the recollection of the average purchaser, who normally “retains a general rather than a specific impression of marks.” *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018).

In this case, each mark consists of two words. And in each mark, the second word is disclaimed. Applicant’s mark is PUMP HAIRCARE, with “haircare” disclaimed, hardly a surprising result given its long list of hair care goods. So, PUMP, the first

word of the mark, is also the only non-disclaimed word in the mark. PUMP is the dominant element of Applicant's mark. It is likely the only distinctive element of the mark.

When we apply the same reasoning to the cited mark, PUMP POWDER, it leads to a similar conclusion. The word "powder" was disclaimed, and Applicant amended its goods to exclude "powders" (from a rather stunning list of other hair care goods), suggesting the word "powder" lacks distinctiveness within this market segment and instead tells consumers something about the Registrant's goods. That leaves the word PUMP as the first and most distinctive element of the cited mark. The dominant element of each mark—and likely the sole distinctive element in each mark—is identical. *In re Denisi*, 225 USPQ 624, 624 (TTAB 1985) ("Thus, if the dominant portion of both marks is the same, then confusion may be likely notwithstanding peripheral differences.").

The marks are similar in appearance as they both begin with the word PUMP. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (finding "the identity of the marks' two initial words is particularly significant because consumers typically notice those words first"); *see also Palm Bay Imps.*, 73 USPQ2d at 1692 ("The presence of this strong distinctive term as the first word in both parties' marks renders the marks similar, especially in light of the largely laudatory (and hence non-source identifying) significance of ROYALE."); *Presto Prods., Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a

purchaser and remembered”). The remaining word in each mark appears to describe something about the goods, and while this does not directly reduce the visual impact of these words, it will make the words less memorable to a consumer. After seeing the marks, and later trying to recall them, the most likely recalled part will be the word PUMP. This result shows the marks are similar in appearance.

Consumers may shorten marks by dropping the nondistinctive element when asking for the goods. For example, a consumer seeking Applicant’s goods in a store that sells hair care products, may simply ask for the PUMP goods. To add the word “hair care” to “pump” when asking for Applicant’s goods would convey almost nothing in a store that sells hair care products. To the extent consumers shorten the marks to their dominant elements, the marks will sound identical. When the entire marks are spoken, the dominant elements will have a greater lasting impact on consumers, and for that reason, the marks, as a whole, are similar in sound.

The meaning of the marks will be highly similar, because it will be driven by the meaning of the word PUMP. In each mark, the second word is disclaimed, and appears to identify something about the goods. The relevant “meaning” here is what the word “PUMP” will mean to the relevant consumers. We need not determine precisely what that meaning is in this case, because there is only one word to define: pump. *In re Embiid*, 2021 USPQ2d 577, at *21 (TTAB 2021) (no evidence the same word meant one thing with applicant’s goods and something else with a registrant’s goods). The marks have very similar meanings.

As these are word marks with one clearly dominant element, the commercial impression created by each mark also will be dominated by the shared word PUMP. The marks, therefore, create very similar commercial impressions.

Applicant submitted evidence that appears to show its own use of its PUMP HAIRCARE mark and other evidence showing what appear to be uses of the cited mark.⁷ This evidence might be relevant in an infringement action between the Applicant and Registrant, but in this appeal, we are limited to the marks as shown in the Application and Registration. *In re i.am.symbolic, llc*, 123 USPQ2d at 1749 (“The correct inquiry requires comparison of the applied-for mark, which only includes the words ‘I AM,’ to the registrants’ marks.”). The back story behind the adoption of the marks and the manner in which some goods may be sold by Applicant are irrelevant to our inquiry. Applicant relied on this evidence as support for its argument that the marks are not similar, so we comment on the evidence here.

To summarize, we find the marks are very similar in sight, sound, meaning and commercial impression. This similarity greatly increases the likelihood of confusion.

B. Similarity of the Goods and Services and Trade Channels

The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.

⁷ Response to Office Action dated June 20, 2022, at 62-96 (Applicant’s uses); Response to Office Action dated February 3, 2023, at 93-142 (Applicant’s uses), 144-65 (apparently uses by Registrant), 167-91 (more of Applicant’s uses).

Octocom Sys., Inc. v. Hous. Comput. Servs. Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *see also Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014).

The cited Registration identifies “hair care preparations; hair styling preparations,” and the Application identifies “non-medicated hair care products” and “non-medicated hair care preparations” as well as many other specific hair care products.⁸ The Application, however, includes the following limitation: “all of the foregoing excluding powders.” Applicant argues this limitation means the goods and services are different.⁹

We disagree, because there are no limitations in the cited Registration. Applicant errs in focusing on a particular product the Registrant allegedly sells, a powder-based hair care product in a pump-type plastic bottle.¹⁰ According to Applicant, this product is a pumped powder, and shows that the cited mark is used to describe the product. While this may be factually accurate, it is not relevant here, because we must use the identification in the cited Registration, and it is not limited to this single product. The Registered mark may be used on any “hair care preparations” and any “hair styling preparations,” whether such preparations include powder or not. Applicant

⁸ The Application identifies some non-hair care goods. We focus on the hair care goods because they are most similar to the goods identified in the cited Registration. It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application. *Tuxedo Monopoly, Inc. v. General Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014).

⁹ 6 TTABVUE 25.

¹⁰ *Id.* at 19-20.

has limited its own identification of goods to exclude powders, but we cannot read limitations into the cited Registration. *In re i.am.symbolic, llc*, 123 USPQ2d at 1748 (“It is well established that the Board may not read limitations into an unrestricted registration or application.”). The goods in International Class 3, therefore, are identical in part, and this fact increases the likelihood of confusion.

There is less similarity between the International Class 35 services identified in the Application and the International Class 3 goods identified in the cited Registration. However, it is well recognized that confusion may be likely to occur from the use of the same or similar marks for goods, on the one hand, and for services involving those goods, on the other. *See, e.g., In re Detroit Athletic*, 128 USPQ2d at 1052 (finding clothing and sports apparel retail services related as “confusion is likely where one party engages in retail services that sell goods of the type produced by the other party”). Here, the refused services relate to retail services involving hair care products, exactly the type of trade channel likely to be used by a party selling International Class 3 hair care goods. We find the services identified in the Application are closely related to the goods identified in the cited Registration.

With respect to similarity of the established trade channels through which the goods reach customers, we presume identical goods move in the same channels of trade and are available to the same classes of customers for such goods—here, general consumers who use or purchase hair care products. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (“[I]t is well established that, absent restrictions in the application and registration, [identical] goods and services are presumed to travel

in the same channels of trade to the same class of purchasers.”) (internal quotation marks and citation omitted). As discussed above, the marks cover legally identical goods, and therefore this presumption applies.

We further note that the International Class 35 services identified in the Application are one of the trade channels both parties likely use to sell their International Class 3 goods. One of the specific services identified in the Application is “retail store services featuring non-medicated hair care products and preparations,” which is a type of retail store a consumer might visit to buy the hair care products offered by the Registrant. There is evidence that a number of retail stores sell store-branded hair care products, which confirms that the International Class 35 services are closely related to the International Class 3 goods.¹¹ This evidence shows that consumers are accustomed to seeing both the goods and services provided under a single mark. The trade channels overlap and that also makes confusion more likely.

C. Purchasing Conditions

Applicant argues that “both Applicant’s customers and Registrant’s customers exercise a high degree of care in making purchases.”¹² Applicant cites no evidence to support this proposition, and we reject it. These are ordinary goods and consumers are likely to exercise ordinary care in purchasing and using such goods. Similarly, there is no evidence to suggest that consumers will be particularly careful when

¹¹ Final Office Action dated August 4, 2022 at 99-136.

¹² 6 TTABVUE 23.

shopping in a retail store that sells hair care products (i.e., the type of International Class 35 services identified in the Application). “Attorney argument is no substitute for evidence.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005); *Martahus v. Video Duplication Servs. Inc.*, 3 F.3d 417, 27 USPQ2d 1846, 1849 (Fed. Cir. 1993) (“[M]ere attorney arguments unsubstantiated by record evidence are suspect at best.”). We treat this factor as neutral.

D. Strength of the Cited Mark

“[T]he strength of a mark is not a binary factor” and “varies along a spectrum from very strong to very weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675-76 (Fed. Cir. 2015) (internal citations omitted). “The weaker [the cited] mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” *Id.* at 1676 (internal citations omitted). In determining the strength of a cited mark, we consider both its inherent, sometimes called conceptual, strength, based on the nature of the mark itself, and, if there is evidence in the record of marketplace recognition of the mark, its commercial strength. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength ... and its marketplace strength”); *Top Tobacco, L.P. v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its

commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006). In general, the commercial strength of a registered mark (factor five) is treated as neutral in ex parte proceedings because the examining attorney is not expected to submit evidence regarding the fame of the cited mark. *See, e.g., In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1086 (TTAB 2016). That is the case here. Applicant has submitted evidence to support its argument that the registered mark is weak (factor six).

If properly made of record, third-party registrations alone may be relevant, in the manner of dictionary definitions, “to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation*, 115 USPQ2d at 1675 (internal quotation marks omitted). *See also Jack Wolfskin*, 797 F.2d 1363, 116 USPQ2d 1129, 1136; *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976) (even if “there is no evidence of actual use” of “third-party registrations,” such registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”). “[E]vidence of third-party registrations is relevant to ‘show the sense in which . . . a mark is used in ordinary parlance.’” *In re Guild Mortg. Co.*, 2020 USPQ2d 10279, at *3 (TTAB 2020).

Much of Applicant’s argument focuses on alleged third-party uses of the word “pump” in their marks, uses Applicant argues dilute the strength of this word within the market for hair care goods.¹³ And while Applicant refers to actual uses of other

¹³ 6 TTABVUE 8-15.

“pump” marks in its brief, only third-party trademark registrations are in the record. During examination, Applicant submitted TSDR records for eighteen third-party registrations that include “PUMP” as part of the mark, and Applicant identified thirteen of those registrations in its brief.¹⁴ Of the thirteen registrations identified by Applicant, eight are for goods in International Class 3 and five are for services in International Class 35.

Most of the goods and services identified in the third-party registrations differ from those identified in the cited Registration. *See Omaha Steaks*, 128 USPQ2d at 1694 (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”); *In re i.am.symbolic*, 123 USPQ2d at 1751 (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration). The Registration identifies “hair care preparations; hair styling preparations,” so relevant third-party registrations should be for the same or similar goods.¹⁵

That leaves the eight registrations for International Class 3 goods. Only three of the eight identify hair care goods: the registrations for ROOT PUMP,¹⁶ PUMP IT

¹⁴ Response to Office Action dated June 20, 2022, at 40-59; 6 TTABVUE 8-13.

¹⁵ Applicant identified registrations with International Class 35 services, apparently because those services are identified in the Application. The fact that Applicant identifies International Class 35 services does not expand the scope of the relevant third-party evidence, because that evidence is offered to show the cited mark is weak, and the cited Registration does not identify any services.

¹⁶ Registration No. 5767880, issued on June 4, 2019. The word “ROOT” is disclaimed.

UP,¹⁷ and GREEN PUMP.¹⁸ One of the remaining five International Class 3 registrations is cancelled¹⁹ and the other four do not identify hair care goods, as shown in the table below.

Mark	Registration No.	Goods
PUMP SPRAY	4502450	Non-medicated topical skin care preparation in spritz form for the purpose of enhancing the blood flow to muscles during exercises to enhance muscle appearance ²⁰
PUMP ‘N POSE	5678700	Cosmetic topical lotion for bodybuilding ²¹
NAIL PUMP-UPS	6468303	False nails ²²
PAINLESS PUMPS	5781100	Body oils; Massage oils ²³

Only the three registrations for hair care goods are relevant here, and that is far too little evidence to show that the word “pump” is diluted for hair care products.²⁴ Two of the three include PUMP as the second word in the mark, and the third, PUMP IT UP, appears to be a phrase that may have a meaning separate from the word

¹⁷ Registration No. 6163653, issued on September 29, 2020.

¹⁸ Registration No. 5836475, issued on August 13, 2019.

¹⁹ “The existence of a cancelled registration—particularly one cancelled for failure to provide a declaration of continued use—does not tend to show that the cited mark is weak due to third-party use.” *In re Embiid*, 2021 USPQ2d 577, at *35 n. 48.

²⁰ Registration No. 4502450, issued on March 25, 2014. Section 8 declaration has been accepted. The word “SPRAY” is disclaimed.

²¹ Registration No. 5678700, issued on February 19, 2019.

²² Registration No. 6468303, issued on August 31, 2021. The word “NAIL” is disclaimed.

²³ Registration No. 5781100, issued on June 18, 2019.

²⁴ By way of comparison, in *Juice Generation*, there were at least twenty-six relevant third-party uses or registrations of record, 115 USPQ2d at 1672 n. 1, and in *Jack Wolfskin*, there were at least fourteen, 116 USPQ2d at 1136 n.2.

PUMP alone. These differences render the limited evidence even less probative. *In re Embiid*, 2021 USPQ2d 577, at *38 n. 57; *In re Integrated Embedded*, 120 USPQ2d 1504, 1513 (TTAB 2016). This evidence does not prove the word “pump” is weak in the market for hair care goods.

There is no other evidence in the record to show third-party use of PUMP with hair care products.²⁵ Applicant did, however, submit evidence (some of it previously relied upon by the Examining Attorney) showing that retail stores offer some of these goods under their own marks, which seems to confirm our finding that the International Class 35 retail services are closely related to the International Class 3 hair care products.²⁶ Applicant’s evidence may show that other health and beauty products (i.e., other than hair care products) are also sold in some of the same stores, but it does not render “false nails” or a “cosmetic topical lotion for bodybuilding” similar to the hair care products identified in the cited Registration.

Applicant also appears to challenge the cited Registration. For example, Applicant argues “the Cited Mark is used on a particular product, a powder that adds volume to hair that is dispersed through a pump.”²⁷ Applicant refers to the “descriptive nature of Registrant’s use ...” as a reason to find no likelihood of confusion.²⁸ But no such collateral attack on an issued registration will be heard by the Board in an ex

²⁵ Applicant did include some Internet evidence that may show third-party uses, but this was submitted for the first time with its appeal brief. As we explained above, we do not consider this evidence.

²⁶ 6 TTABVUE 13-14.

²⁷ *Id.* at 18.

²⁸ *Id.* at 20.

parte appeal. *See In re Solid State Design Inc.*, 125 USPQ2d 1409, 1410 n.4 (TTAB 2018) (“the present ex parte proceeding is not the proper forum for such a challenge ...”) (quoting *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997)).

Furthermore, because the cited Registration is “prima facie evidence of the validity of the registered mark,” *see* Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), we must assume that the mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act. *See Tea Bd. of India*, 80 USPQ2d at 1889. *See also New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *10 (TTAB 2020). Thus, we afford Registrant’s PUMP POWDER mark “the normal scope of protection to which inherently distinctive marks are entitled.” *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1347 (TTAB 2017). We treat the two strength factors (five and six) as neutral.

E. The Lack of Actual Confusion

Applicant argues that it “is a well-known business in the hair care and cosmetics space.”²⁹ And because “Applicant is not aware of any instances of actual confusion between Applicant’s Mark and the Cited Mark,” it argues confusion is not likely.³⁰ “[I]n this ex parte context, there has been no opportunity to hear from Registrant

²⁹ 6 TTABVUE 26.

³⁰ *Id.*

about whether it is aware of any reported instances of confusion. We therefore are getting only half the story.” *In re Guild Mortg.*, 2020 USPQ2d 10279, at *7.

Under the eighth *DuPont* factor, the absence of reported instances of confusion are meaningful only if the record indicates appreciable and continuous use by Applicant of its mark for a significant period of time in the same markets as those served by Registrant under its mark. *Id.* at *8; *Made in Nature v. Pharmavite*, 2022 USPQ2d 557, at *56-57. There is no such evidence in the record here. We find the eighth *DuPont* factor neutral.

F. Conclusion – Weighing the *DuPont* Factors

Our evaluation of the *DuPont* factors shows that confusion is likely. The marks are very similar. The International Class 3 goods are legally identical in part and the International Class 35 services in the Application are closely related to the International Class 3 goods identified in the cited Registration. These two factors weigh very heavily in the likelihood of confusion analysis and both make confusion more likely.

The trade channels overlap, which also makes confusion more likely. In this case, the services identified in the Application are a primary trade channel of the identical-in-part International Class 3 goods. All roads point to confusion. The remaining *DuPont* factors are neutral. We affirm the partial Section 2(d) refusal.

Decision: The partial Section 2(d) refusal is affirmed, and applies to all goods in International Class 3 and all the services in International Class 35, except “consultancy, advisory and information services relating to retail and wholesale

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service and sales promotions.” The goods and services subject to refusal will be deleted from the application, which will proceed with those items excepted from the refusal.